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Argued by
CHARLES H. TUTTLE

IN THE

Supreme Court of the United States

October Term, 1946

No. 606

THE UNITED STATES OF AMERICA,
Petitioner,

against

SAMUEL BAYER, ELIAS BAYER and
WALTER V. RADOVICH,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS SAMUEL BAYER AND ELIAS BAYER

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On December 9, 1946, this Court granted a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, dated and filed August 14, 1946 (p. 1476), pursuant to its opinion (pp. 1467-76), reversing the judgment of the United States District Court for the Southern District of New York, entered upon a verdict of guilty (pp. 1176, 1344-6) and based upon an indictment (pp. 8-11) charging these respondents with violation of Section 88 of Title 18, United States Code.

The opinion of the Circuit Court of Appeals is reported in 156 F. 2d 964, and is in the Record at pages 1467-76.

The subsequent references in this brief are to folios unless otherwise stated.

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

As regards the respondents Samuel and Elias Bayer, the following are the basic questions involved:

1. Whether the Circuit Court of Appeals, in the exercise of its supervisory power as to the fairness of criminal trials, committed error in holding that the trial court's charge to the jury as to the basic issues concerning the guilt of the Bayers was inadequate and too equivocal and too difficult to understand, if not actually misleading to a jury of laymen.

2. Whether the Circuit Court of Appeals, in the exercise of its supervisory power as to the fairness of criminal trials, committed error as regards the Bayers in holding that the jury should not have been left with a partial and misleading picture of the facts concerning the whereabouts and telephoning of the defendant Radovich on November 24, 1943.

3. Whether the trial court committed errors prejudicial to the respondents Bayer as set forth in their other assignments of error.

The Gravamen of the Decision of the Circuit Court

As regards the Bayers, the unanimous holding of the Circuit Court was (1471-3):

> "We are all agreed, however, though for somewhat differing reasons, that the ends of justice require a new trial in this case."

This determination and reversal as to the Bayers naturally and inevitably required a reversal also as to their co-defendant, Radovich. Again, to quote the opinion of the Circuit Court (1473):

> "In view of the charge of conspiracy, reversal as to the Bayers necessitates also a reversal as to Radovich."

It is true that the Circuit Court thereafter went on to discuss "two claims of error" made "in addition" by Radovich and peculiar to the case against him. But the fact is that, irrespective of such further discussion, the reversal as to the Bayers necessitated a reversal as to Radovich.

In other words, the decision of the Circuit Court was merely that there should be afforded to the Bayers an opportunity for a clearer and more definite and precise charge as to the issue determining guilt or innocence, and also an opportunity for a decision thereon by the jury after having the full facts concerning the important events of November 24, 1943. Such action necessarily carried with it a new trial as to Radovich irrespective of the merits of the additional two claims of error made by him. (*United Brotherhood of Carpenters v. United States*, decided by this Court March 10, 1947; 15 Law Week 4326, 4330.)

Statute Involved

The only statute involved is Section 37 of the Criminal Code, 18 U. S. C. 88, which provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

The Indictment

The indictment, in a single count (22-32), charges the three defendants with conspiracy to defraud the United States under Title 18, Section 88, United States Code. It charges that, beginning on or about September 1, 1942, the defendants combined with each other, and with other persons whose names are unknown, to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of officers of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud, and, more particularly, its right to the conscientious and faithful services and judgment of defendant Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud.

It is alleged that as a part of the conspiracy defendants Samuel Bayer and Elias Bayer became acquainted with various officers, entertained and made gifts to them, and gave sums of money amounting to approximately $7,000 to defendant Radovich, a Captain, with intent to influence his action and to induce him, in violation of his lawful duty, to transfer Privates Martin Bayer and Melvin Usdan, both soldiers, from and to various units of the United States Army in order that they would not be attached to a unit which was about to be sent out of the continental United States. The indictment sets forth a number of overt acts in furtherance of the conspiracy charged (28-32).

The Trial and Verdict

After a lengthy trial before Hon. Alfred D. Barksdale and a jury, the jury, on October 23, 1945, returned the following verdict (3526):

> "We find them guilty, *with the highest degree of clemency for all three defendants*".

The Sentences

On the next day, the Court sentenced the defendant Samuel Bayer to a term of imprisonment of two years and a fine of $10,000 and the defendant Elias Bayer to a term of imprisonment of eighteen months and a fine of $5,000; and the defendant Radovich to a term of one year and a day (3632-4). The jail sentence of two years for Samuel Bayer was the limit. It was in excess of the United States Attorney's recommendation of eighteen months. The jail sentence of Elias Bayer to eighteen months was in excess of his recommendation of a year and a day (3533-5).

A motion for bail pending the appeal of Samuel Bayer and Elias Bayer was granted by the Circuit Court of Appeals, after considering the moving papers and hearing argument.

Thereafter the Bayers made a motion for a new trial on newly discovered evidence under the circumstances stated in Point III, *post*.

Statement of Facts

At the conclusion of the trial, the case against the Bayers (assuming there was any sufficient case at all) came down to certain financial transactions between them and Radovich. Those transactions were the subject of the summations and of the charge. There was no evidence of corruption of or by any other officer.

Neither of the Bayers nor Radovich testified. Certain written statements taken from each by the investigating officers were put in evidence. The statement by Radovich was objected to by the Bayers' counsel and was expressly received by the Court solely as evidence against Radovich and against him alone (1976).

The theory of the Bayer defense was that the Bayers were the victims of coercion and duress practiced upon

them by Radovich; that he extorted money from them by threats and menaces of violating his duty; and that the payments were made in the hope that these grave threats would not be carried out but that, on the contrary, he would perform his duty.

In the eye of the law as well as by any standards of morals, an assent or conduct forced by coercion, duress or threats of exposure to harm or danger is not an assent or voluntary conduct at all and certainly is not a conspiracy to defraud the United States.

As we shall show hereinafter, not only was this defense not accurately or appropriately set before the jury in the charge, but actually it was (as we submit) misstated; and the jury were left, if not indeed bound, to infer that in law it was no real defense at all and that essential factors in it were irrelevant. See Point I, *post*.

The following statement is presented for the purpose of showing how forceful and substantial that defense was in point of fact and how vital to the rights of the Bayers was a full and correct charge concerning its factual and legal bases. (*Bollenbach* v. *United States*, 326 U. S. 607, 613-5; *M. Kraus & Bros., Inc.* v. *United States*, 327 U. S. 614, 627; *Bihn* v. *United States*, 328 U. S. 633, 637-8.)

A

The respondents Samuel Bayer and Elias Bayer, two brothers, were engaged in the business of manufacturing yarn and thread under the name of Plymouth Thread & Rayon Corporation, and thread converting under the name of Thread Converters, Inc., with offices at 30 West 21st Street. They enjoyed a very good reputation and had never previously been in any difficulty. Their good character was testified to by the president of a bank, their minister and by business men and attorneys of repute (2451-71, 2638-55).

The elder brother, Samuel, has three sons, Martin, Robert and Sanford. At the time of the trial, Martin, a soldier, was in Burma; Robert, a soldier, was at Okinawa; and Sanford, a sailor, was aboard a United States warship (2477).

In December, 1942, one of these sons, Martin Bayer, then eighteen years of age, and Melvin Usdan, a nephew of Samuel and Elias Bayer, voluntarily enlisted in the United States Army Air Corps (2481, 3702-3). Martin was not strong, had suffered from rickets and was only accepted upon his urgent request (2480-8). After being sent for a short time to Camp Upton (2489), both young men, within two weeks of their enlistment, were assigned to duties as filing clerks in the Headquarters Base, Mitchel Field, Long Island (2495). Being volunteers, they were entitled to choose the branch of the service in which they wished to serve, and they had designated the Air Corps (828-9).

B

In January, 1943, while at a night club in New York City, Elias Bayer met two officers, who were stationed at Mitchel Field, Lt. Col. Vidal and Lt. Roser (396-8, 3817). They entered into conversation and became quite friendly (3817). The officers asked Elias about his business and, on being told, they inquired if he knew anybody in the uniform manufacturing business and about the possibility of securing uniforms at a wholesale price (3817-18). Elias responded in the affirmative and the officers took his telephone number (3847).

A month later, the officers telephoned him, came to his office, and there met Samuel for the first time (399-403, 3818). A conversation followed concerning the procurement of uniforms at wholesale. Elias Bayer accompanied the officers to the establishment of I. Buss Company, run by three brothers named Busch, one of whom was a

brother-in-law of Samuel Bayer. Elias introduced them and arranged for their buying uniforms at wholesale prices (3819-20). It was Elias Bayer's understanding that the officers would pay for the uniforms (3848). This was also understood by Harold Busch (562, 590, 607-8).

Subsequently, a friendship developed between these two officers and the Bayers (3820, 3715-18). Through them, Elias Bayer met Lt. Col. Jacobson of the First Fighter Command at Mitchel Field (1090, 3820). Col. Jacobson thereafter met Samuel Bayer at the office and was extended the same courtesy of purchasing a uniform at wholesale from the Buss Company (1094-5, 3820).

While Col. Jacobson was at Bayers' office he noticed the pictures of the two young soldiers, Martin Bayer and Melvin Usdan, in uniform on the wall of the office (2760-3, 3673). He inquired about them and Samuel Bayer told him that the boys were filing clerks at Mitchel Field in the Headquarters Base Command (2761-2, 3822-3, 3673). Col. Jacobson thereupon stated that he could use clerks in his outfit and said that he was going to have them transferred (2762-3, 3822-3, 3673-4).

In April, 1943, without any request from the Bayers, Col. Jacobson requisitioned the boys from the Headquarters Base to his own command, the First Fighter Command (2501, 1101-3, 2761-3, 3822-3).

Col. Jacobson, a witness for the Government, testified that he had not acted upon any inducement from the Bayers and that they had never requested him to do anything improper or corrupt (1136, 1149). Indeed, no witness called by the Government testified to any improper action or favoritism as regards these two young soldiers, done at the request of the Bayers or otherwise (429, 432-4, 540, 544-5, 867, 1136, 1149). Nor does the indictment make any such charge against any officer other than Radovich.

C

Defendant Radovich—then a Captain, a flyer,—became the commanding officer of Privates Bayer and Usdan when they thus joined the First Fighter Command (1103, 2503).

Radovich met Samuel and Elias Bayer through the other officers above mentioned, and under similar circumstances. He likewise wished to procure a uniform at wholesale price and was introduced by Elias Bayer to the Buss Company (3673-4, 3822-4).

While Elias Bayer had understood that the uniforms would be paid for (3848) and the officers had been given bills at wholesale prices in the packages containing the uniforms (598-9), none of them paid the Buss Company (596, 3847-8). Some of them complained that the uniforms did not fit and Radovich returned both of his to the Buss Company (3740-1, 3849-50, 596-7, 451-2). Being unpaid, the Buss Company, a small concern, called upon the Plymouth Thread Corporation to pay for the uniforms, which it thereafter did (498-9, 596, 3737-8, 3848).

Radovich visited the office of Samuel Bayer very frequently (2767-8, 3674-5, 3824). He accepted much hospitality. It soon became apparent that he was greedy and avaricious. He showed an acquisitive interest in things which he saw around the office (3743). For example, he hinted about a traveling bag of Samuel Bayer and received a similar one (3743-4), and, again, a set of golf clubs which belonged to Martin Bayer were loaned to him but he never returned them (3790-1). He took advantage of the privilege of purchasing theatre tickets, which he charged to the account of Plymouth Corporation (3772, 3881). The other officers were entertained and on one occasion, upon his birthday, a set of automobile tires was given by Samuel Bayer to Col. Jacobson (1108-16). His relations with Elias Bayer were close (1134) and they had exchanged gifts. For example, when a child was born to

the Elias Bayers, Col. Jacobson presented them with a baby blanket (1156-7). Col. Jacobson, testifying for the Government, stated that he had never done anything for Samuel Bayer in return (1136, 1149-50). In fact, all of the officers were called as Government witnesses and uniformly testified that they had done nothing in their official capacities for the Bayers and had never been requested to do anything improper or corrupt (429, 432-4, 540, 544-5, 867, 1136, 1149).

Samuel Bayer was greatly concerned about his son, Martin, who, as above stated, was not strong and vigorous and had been accepted only upon his own insistence (2480-8). Martin was given no physical training by the Army to fit him for the combat service of a soldier. He received only two weeks' basic training (2495). He was given work as a filing clerk, for which he apparently was best suited (2498). It was obviously never the intention of the Army officers to make a combat soldier of him. The same appeared true of Melvin Usdan, who received only about one week's basic training (2492). He likewise was a filing clerk (2495).

D

When Radovich became friendly with Samuel Bayer, he learned of the extreme solicitude of Samuel for the welfare of the boys and promptly proceeded to prey upon it. He was a young man, active, strong and daring—a flyer—and he told Samuel of the dangerous nature of his work (3686-8). Unquestionably, he was a brave soldier but his purpose was formulated to take advantage of Samuel's great interest in the boys. This is shown by the subsequent developments.

In the early summer of 1943, Radovich came to Samuel Bayer's office and informed him that something had occurred at Mitchel Field which required him to transfer Martin Bayer and Melvin Usdan to another camp (3675-6, 3826). The boys were happy at Mitchel Field and Samuel

Bayer asked Radovich to leave them alone (3676). He said he could not and thereupon left Bayer's office (3676). He returned on the following day and told Samuel Bayer that he had an angle through which he could have the boys transferred to the Medical Unit at Mitchel Field (2772-3, 3676-7, 3828-9). At the same time, he told Samuel Bayer that he needed $500 in order to send his wife home to Los Angeles (2775-6, 3677, 3829). Samuel Bayer was taken aback at Radovich's suggestion. He had extended hospitality in the form of entertainment and gifts but never in the form of money. He told Radovich that he did not have that amount of money available, but to come in on the following day (2776). He was uncertain whether it was a loan to Radovich or a hold-up (3677, 3829-30). On the following day he gave Radovich $450 (3746, 3830). He could have given him $500 but did not wish Radovich to think that he could pay out such large sums of money with ease (3677).

Radovich returned to Bayer's office about a week later and said that the transfer to the Medical Unit was going through and at the same time said that he needed $500 additional, but gave no explanation for his request for this additional money (3679, 3830, 2776). Samuel Bayer, by this time, was in fear of Radovich's control over the boys and was worried that harm might come to them, so he promised to give Radovich the money (3679). To use Samuel Bayer's words, "I was scared if I didn't give it to him he will take it out on my kids" (3679).

Some days later, Radovich again called at Samuel Bayer's office and told him that the application for transfer to the Medical Unit had fallen through and that the boys would have to go overseas (3679, 3831-2). This coercive assertion was made by Radovich in spite of the fact that the young men had received at the most only two weeks of basic training and could not properly be sent overseas (2492-5, 2630-3). Radovich told Samuel Bayer that he needed $1,000 and assured him that if that amount were paid the applications would be approved (3680,

3832). Samuel Bayer was greatly upset at the prospect that the boys might be transferred overseas without any adequate basic training and he was fearful of the power of Radovich over the boys (3679-80, 3749). While at first he delayed about giving Radovich the money, he told Radovich to call him up later on. A few days later, Radovich telephoned to Samuel Bayer, requested the money and asked Bayer to meet him at the Radio City Theatre (3680). Samuel Bayer went to the theatre and met Radovich there. They walked to Radovich's car, which was parked at the corner, and there Samuel Bayer gave Radovich $500, informing him that he would try to get together some more money within a few days (3680-1, 3752-3). A little later on, Radovich telephoned Samuel Bayer and asked Bayer to meet him at the St. Moritz Hotel, where Bayer then gave him $400 (3681, 3754-5). On the following day, Radovich went to Bayer's office and succeeded in obtaining an additional $600 (3681, 3755).

Upon applications made in the regular form by Martin Bayer and Melvin Usdan, at the instance of a 1st Lieutenant of the Medical Corps at Mitchel Field (Dft. Bayers' Exh. D), they were transferred from the First Fighter Command to the Medical Unit at the same field. The labor there was arduous and Usdan testified they worked both day and night (2518-19). They remained there for about a week (2518, 3682-3). They then received orders for a further transfer—Martin Bayer to Bradley Field, Connecticut, and Melvin Usdan to Westover Field, Massachusetts (2520). They were attached, at these fields, to the Medical Unit of Airborne Engineers (2522). They remained at these fields throughout the late summer and early autumn of 1943 (2525-9). There was nothing to show that these transfers were obtained through corruption by Radovich. They went through in the regular way.

In the latter part of August, 1943, Radovich, then a Major, began a larger design as to the two boys. He sought and obtained through a Captain Pepper at Mitchel Field information as to their whereabouts (624-5).

E

In about September, 1943 Radovich became a member of a secret and highly dangerous project commanded by Col. Philip Corcoran, which was to operate behind the Japanese lines in Burma as a commando unit (631-2, 780, 686-7, 698).

This unit was strictly voluntary in its nature and was intended for well-trained, daring volunteers (631-2, 686-98). Radovich had broad authority to select any members of it (2785). But the work was so hazardous that nobody was required to become a member without his consent, even though he had been selected (632, 686-98, 793, 807-8).

The assembly point of this unit was Goldsboro, North Carolina. Corcoran or Radovich designated and selected the members, which would be followed by a notification from Col. Goetz in Washington of the necessary orders for the transfer (755-63). The notification would result in orders as a matter of course. A young woman, Miss Goertz, in Col. Goetz's office, would prepare these orders at the request of Corcoran or Radovich (757-63).

In the meantime, Radovich had not abandoned his scheme to extort money. Shortly after the boys were transferred respectively to Westover and Bradley Fields, Radovich telephoned Samuel Bayer and informed him he knew who was responsible for the transfer of the boys from the Medical Unit and that if Bayer paid him $1500 additional he would have them re-transferred to Mitchell Field (2779, 3684-5). Samuel Bayer remonstrated and "asked him to please forget about it, to leave the boys alone as they were very happy where they were at their new station" (2779, 3684-5). For the time being Radovich subsided (3685).

For about a month Samuel Bayer did not hear from Radovich. Then Radovich telephoned to Bayer's office, talked with his secretary, Miss Solomon, and she made an appointment for Radovich to meet Bayer and herself at

the McAlpin Hotel in New York City (2781-3; 3685-6). He was accompanied by another officer. They dined together and Radovich related his flying exploits (3686). The apparent purpose of this McAlpin meeting was to impress upon Samuel Bayer the dangerous nature of Radovich's new duty and assignment.

F

Subsequently, nothing was heard from Radovich for maybe six weeks or two months (3686). Then, suddenly, during the morning of November 24, 1943, Radovich telephoned "collect" to Miss Solomon at Bayer's office, from Arlington, Virginia,—the location of the Pentagon Building of the War Department and of the Washington Airport (2779-80, 3360-1, 3386, 3508-13, 3788). He was by that time fully set "to put the squeeze" on the Bayers in a big way.

This call is shown by the record of the Telephone Company, which became available after the case was submitted to the jury and while the jury was out (3508-18). It records that a telephone call was made "collect" by Radovich from Arlington, Virginia, to Chelsea 3-2872, which is the Bayers' telephone number in New York City, on November 24, 1943. As shown hereafter, it was error for the Judge to refuse to admit this slip in evidence, for it directly corroborates the testimony of Miss Solomon. Exception was taken to the ruling which excluded it (3519).

Miss Solomon testified that this telephone call by Radovich was to tell her that he was flying to New York, and that it was very important for him to meet her and Samuel Bayer. An appointment was thereupon made for lunch at Cavanaugh's Restaurant (2780, 3686-7). There were present, Radovich, Samuel Bayer and Miss Solomon (2784, 3686). Radovich told them that he was attached to a commando unit which was going abroad to the

Burma-India front "on a very dangerous mission" and that it "would write history" (2784, 3687-8). He told Samuel Bayer that he was taking Martin Bayer and Melvin Usdan with him as members of this commando unit, "and if the boys were lucky enough to return they would return in eight months" (2784-5, 3688).

The boys, as Samuel Bayer knew, were utterly unfitted and untrained for such dangerous work and had received no substantial amount of basic training (2492-5, 2630-3). Nevertheless Radovich had already, on November 22, 1943, selected these inexperienced and unqualified young men as members of the Special Commando Unit; and, in fact, orders for their transfer to that Unit from their posts at Bradley Field and Westover Field had already been issued, at Radovich's insistence (764-6).

Samuel Bayer remonstrated and asked Radovich "why he was taking it out on the boys" (2785, 3688). Radovich responded that he had the authority to do it, that "he could do anything he wanted" (2785), but that if Samuel Bayer would pay him $5,000 he would release the boys from the unit into some other outfit (2785-6, 3688-9).

Thereupon Samuel Bayer begged Radoyich not to interfere with the boys but to leave them alone (3689, 2787). Radovich's response was that the boys would have to go with him and that Samuel Bayer should not worry *"because maybe if the boys were lucky they would come home alive"* (2787, 3688).

Samuel Bayer kept on pleading with Radovich, who insisted that the money must be paid promptly. Radovich turned a deaf ear to the pleas of Samuel Bayer (2787, 3689). He finally gave Samuel Bayer a direction for the payment of the money (3689).

On the same day (November 24) that Radovich was making these demands, Martin Bayer telephoned to his father and told him that he and Melvin Usdan had been ordered to Goldsboro, North Carolina, and were even then going through New York City en route (3687).

On the very next morning (November 25), Radovich came to Bayer's place of business and asked "What did you decide?" (2788-9, 3690). Samuel Bayer again begged him to leave the boys alone. Radovich replied that it was not up to him alone but that he had to pay most of the money to others in order to prevent the departure of the boys with the commando unit, and he advised Samuel Bayer to act promptly (2788-9, 3690-1). Elias Bayer, who overheard some of the conversation, also then pleaded with Radovich to leave the boys alone, to which Radovich replied by giving an "ultimatum" that the money had to be delivered to *him at Goldsboro* promptly (3835-8).

During the course of these discussions the two young men were, to the knowledge of the Bayers, traveling to the commando unit at Goldsboro, North Carolina where they arrived at 3:30 in the afternoon of November 25 (786-91, 2551-60, 2585-7).

G

Finally yielding to the demands of Radovich, Samuel Bayer sent $5,000 to Radovich, which was delivered to him personally at Goldsboro "a day or two" later by an unnamed person, who was accompanied by Elias Bayer (3758, 3765-6, 3839-41).

The petitioner's brief (p. 9) says that the $5000 was not delivered to Radovich until *after* the boys had been transferred out of his commando unit on November 29. This is a mistake. The money was delivered not later than November 27 (3839).

After Martin Bayer and Melvin Usdan reported at Goldsboro, Lt. Col. Boebel, who was the Adjutant of the Air Commando group at the time when they arrived, later found them unfit for its purposes (791-2, 795-6, 817-18). He testified that he told Radovich "I do not think these are the type of men we want in our organization. They are not the calibre of man that we are looking for"

(795-6). He directed Radovich to transfer them out of the unit (795-6, 817-18). They remained there only about a week (2546-7). Radovich, in full possession of the $5,000, then arranged the transfer of Martin Bayer and Usdan to the Newcastle Army Air Base, Air Transport Command, at Wilmington, Delaware (767-9, 2546). The Special Order for their transfer is dated November 29 (363).

Thus, Radovich had fully accomplished his scheme of extortion. The payment made by Samuel Bayer had been coerced from him by Radovich, who had refused to do his true duty by the boys and had included them in a commando unit for which they had not volunteered and were not fitted, and who took advantage of the situation which he had created, in order to achieve and execute his wrongful purpose.

H

The theory of the Bayers' defense, which was entirely overlooked or disregarded by the Trial Court in his charge to the jury, is that the Bayers wanted Radovich to do his duty as an officer, not to violate it; that Samuel Bayer made the payments, not to corrupt Radovich but in order to induce him to act properly and conscientiously toward the two young soldiers, Martin Bayer and Melvin Usdan.

These two boys had only two weeks of basic training and were not fit for Radovich's Commando Unit, which was intended for highly dangerous special duty in the Pacific. Nor had the boys volunteered for such duty, though it was a voluntary unit. Nor were they physically or by training equipped for such a task. Hence, Radovich's duty was to *exclude* them from the unit—*not* to *include* them.

It was further the theory of the Bayers' defense that the payments made by the Bayers were coerced and ex-

torted from them by Radovich, who threatened not to do his true duty by the boys, but to discriminate improperly against them, unless he were paid, and who took advantage of the situation to frighten the Bayers in order to achieve and execute this plan of extortion.

I

After the conviction and before the appeal was argued in the Circuit Court of Appeals, the Bayers made a motion before Judge Barksdale for a new trial on the ground of newly discovered evidence as to the events of November 24 and 25, 1943. Judge Barksdale adhered to his rulings at the trial.

The record on that motion has been certified here, and is discussed in Point III, *post*. We submit that it sustains conclusively the justice of the Circuit Court's award of a new trial.

POINT I

The Circuit Court of Appeals, exercising its supervisory power as to the fairness of criminal trials, committed no error in holding that the Trial Court's charge to the jury as to the basic issues concerning the alleged guilt of the Bayers was inadequate and too equivocal and difficult to understand, if not actually misleading to a jury of laymen.

(1) A case of an inadequate, confusing and misleading charge, quite similar to the present in its degree of ambiguity, is presented by *Bollenbach* v. *United States*, 326 U. S. 607, where this Court reversed a conviction and said (pp. 613-5):

"What reason is there for assuming that the jury did not also fail to appreciate these factors which the

Government, in an elaborate argument, explains as requisite for a proper understanding of that which at best was dubiously expressed? A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal. * * *

In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts. * * *

In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

In *Bihn* v. *United States*, 328 U. S. 633, this Court again reversed a conviction because of an inadequate, confusing and misleading charge, saying (pp. 637-8):

"We assume that the charge might not be misleading or confusing to lawyers. But the probabilities of confusion to a jury are so likely (cf. *Shepard* v. *United States*, 290 U. S. 96, 104) that we conclude that the charge was prejudicially erroneous. * * *

And in any event the probabilities of confusion in the minds of the jurors seem so great, and the charge was so important to the vital issue in the case, that we conclude that prejudicial error was committed. * * *

Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See *Bollenbach* v. *United States*, 326 U. S. 607."

See also like action by this Court under like circumstances in *Kraus & Bros.* v. *United States*, 327 U. S. 614, 627.

If the right and duty to make rulings of this character and thus to appraise the fairness of criminal trials are part of the appellate jurisdiction of this Court, then all the more are they part of the appellate jurisdiction of circuit courts of appeals. (*McNabb* v. *United States*, 318 U. S. 332, 340-1.)

(2) At the outset, we challenge as incorrect the statement on pages 3 and 85 of the petitioner's brief that the trial judge's charge "concerning the defense of extortion" was "concededly proper" or "concededly accurate." On the contrary, both at the trial and since we have earnestly argued that it was erroneous, misleading and prejudicial.

(3) As regards the Bayers, the "basic issue" in the case was whether or not the payments had been extorted by Major Radovich by threats to violate his duty, or had been made pursuant to conspiracy to seduce Radovich from fulfilling his duty.

Exception was taken to the failure of the Trial Court to charge adequately as to this basic distinction, which goes to the essence of the case for the defense, and to its refusal of a request designed to clarify the fact and the nature of the distinction (3436, 3400-1).

No denial was made that they had paid him money, but they explained in their statements that this was the result of a "hold-up" and that the payments were actuated by their fear that harm would come to the two young soldiers by reason of Radovich's wrongful tactics, since they had not received sufficient basic training to be sent overseas and were not fit for commando service behind the Japanese lines in Burma.

The Trial Court, in its charge, though it fully outlined the theory of the prosecution, neglected to outline the theory of the defense. The Court merely said (3400-1):

> "Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include Privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for an immediate dangerous overseas mission, which would be a violation of his duty as an officer."

This was a mere description—and both incomplete and inadequate—of the defendants' claim. It was not a charge as to the extent to which in law it would be a defense or as to the rules of law which should be applied to its component elements.

It will be observed that there was no statement by the Trial Court anywhere in the charge that the jury could find that there would in law be no conspiracy or agreement on the part of the Bayers as charged in the indictment if the jury believed the contention of the defense, namely, that the Bayers were the victims of a shrewd and ruthless plan of extortion. The Judge should have instructed the jury that, if the jury found that the moneys, or the promise to pay the moneys, were obtained by Radovich from the Bayers as the consequence of a scheme of extortion concocted by Radovich, in that event there would not be a voluntary agreement, which is the essence of a conspiracy under United States Code, Title 18, Section 88.

(4) These errors of commission and omission were greatly accentuated by two further errors and by inadequate, confusing and equivocal statements in the Court's further instructions to the jury.

In the first of these errors, the Trial Court told the jury, in practical effect, that the defendants Bayer would be guilty even though the payments of money were involuntary on their part.

Thus the Court said (3401):

> "If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily."

This instruction, we submit, was grossly misleading and prejudicial.

Certainly, if the payments were made by the Bayers involuntarily and as a result of duress, threats and coercion, the jury should have been instructed that they could find that there was no agreement on the part of the Bayers, inasmuch as their action would then be the result, not of a true meeting of the minds, but of extortion and duress.

The Court, on the contrary, charged in effect that if the defendants Bayer paid money to Radovich, the fact that such payment was made "involuntarily" would constitute no defense if it were made as part of an "agreement". The Court did not call the jury's attention to the vital consideration, which was fundamental in the defense, that if the so-called "agreement" was itself wrung from the Bayers by the threats and coercion, then both it and any payments made pursuant to it were not voluntary and, in consequence, the defense would be established. It was serious error for the Court to fail to include and submit the issue of whether the alleged "agreement" which accompanied or preceded the payment of the money was itself made voluntarily or involuntarily on the part of the Bayers.

In other words, to confine, as did the Court, the issue of voluntary or involuntary action to the mere payment of the money, without also extending it to include the matter of the "agreement" alleged to have accompanied or antedated the payment of the money, was basic and prejudicial error.

(5) In the second of these errors the Court used language which a jury of laymen could easily understand as instructing them to find the defendants Bayer guilty, even though the jury should find that the payments made by them were the result of coercion and extortion.

The Court said (3403):

> "However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants."

The foregoing instruction was highly misleading and prejudicial.

It could be construed as an instruction to find the defendants Bayer guilty, even though the so-called "agreement" and their payments under it were the consequence of the menacing demands of Radovich, and even though all that the Bayers desired was that Radovich should perform his true duty as to the boys.

(6) The jury evidently sensed this fundamental distinction in the mental and moral quality of the Bayers' acts but felt themselves prevented by the Court's charge from giving that distinction expression in the field of law.

In no other way can their exceptional recommendation of "the highest degree of clemency" be accounted for (3526).

(7) As a result of these confusions, the Circuit Court of Appeals declared and held that the charge (156 Fed. (2d) 964, 967)

> "was so cryptic as to be difficult to understand, if not to be actually misleading to a jury of laymen. Of course, reversal should be ordered if the charge, although technically correct, is so equivocal as to be probably misleading in actual fact."

This declaration was in accord with the principles laid down by this Supreme Court in *McNabb* v. *United States*, 318 U. S. 331, 340-1. It also shows the petitioner's brief to be in error in stating at page 86 that "it is not clear whether reversal of the judgments would have been rested on this ground alone."

POINT II

Furthermore, the Circuit Court of Appeals, in the exercise of its supervisory power as to the fairness of criminal trials, also committed no error in holding that "the jury should not have been left with a partial and misleading picture of the facts" concerning the whereabouts and the telephoning of Radovich on November 24, 1943.

(1) The Circuit Court of Appeals was also clearly correct in holding that, under the circumstances and the importance which the matter had come to have, the Trial Court seriously prejudiced the Bayers in refusing to receive in evidence the record of the Telephone Company, which showed that a telephone call had been made collect by Radovich from Arlington, Virginia, presumably the Pentagon, to the Bayers' office in New York City on November 24, 1943,—precisely as testified by Miss Solomon (3508-19). Exception was duly taken (3519).

The background shows the gravity of this refusal and the serious damage which it occasioned to the defense.

(2) Miss Solomon, Samuel Bayer's secretary, testifying for the defense, stated that Radovich telephoned her one morning in November, 1943 *from Washington* and that she made an appointment for Samuel Bayer and her to meet him at Cavanaugh's Restaurant in New York City (2779-80). He there made threats that the two boys would have to go with him on his Commando mission, and, if lucky, they would come home alive (2784-7). He further stated in this conversation that he had broad authority and if Bayer paid him $5,000 he could have the boys transferred into some other unit (2785-7). The very size of the sum demanded showed its extorsive purpose.

Samuel Bayer said the same thing in his statement (Exh. 8, fols. 3686-9).

On the following day (November 25) returned and demanded "a decision" (2788-9).

The meeting at Cavanaugh's Restaurant took place *on the same day* that Martin Bayer called his father on the telephone from an Army Field in Connecticut and told him that he and his cousin Melvin Usdan were being transferred and were then in transit to Goldsboro, North Carolina (2788).

Melvin Usdan testified that he and Martin Bayer telephoned to their folks on November 24th, telling about their transfer to Goldsboro (2582-7).

The date (November 24th) was thus definitely fixed as the date of the Cavanaugh Restaurant meeting described by Miss Solomon; and the U. S. Attorney, in his summation, referred to Usdan's statement of the date of his telephoning as accurate (3213-14).

(3) The petitioner's brief twice urges that the decision of the Circuit Court of Appeals is based upon a "misconstruction of the United States Attorney's argument" concerning November 24, 1943. (Brief, pp. 30, 79).

This is not the fact. The United States Attorney urged, as the climax of his summation, that since Miss Goertz testified that Radovich telephoned her on November 24th from Goldsboro, North Carolina and that since her testimony was clear and uncontradicted, Radovich could not have phoned to Bayers' office from Washington and met Samuel Bayer and Miss Solomon in New York City, at Cavanaugh's Restaurant on that day. The best evidence is, of course, the reproduction of this portion of his summation. At folio 3213, the United States Attorney said at the close of his summation:

> "Now you will recall that neither Sam Bayer in his statement nor Miss Solomon in her testimony from the stand was able precisely to fix that date of that meeting in Cavanaugh's restaurant, but young Melvin Usdan fixed it precisely. He testified that he and Martin arrived at Goldsboro, North Carolina, on November 25th, and he testified that they had left Westover the day before, November 24th. He testified that the date he left, the 24th, he phoned his family and Martin Bayer phoned his father, Samuel Bayer. So that the date, the date of the telephone call which informed Sam Bayer of the transfer is definitely fixed; and since that is the date that Sam Bayer says he met Radovich at Cavanaugh's, the date of that meeting at Cavanaugh's is fixed definitely and precisely as the 24th of November, 1943.
>
> So, on the very day, November 24th, that Radovich, according to Bayer, is making the first threats here in New York to take these boys unless he got $5,000, Radovich, according to Miss Goertz, is actually in Goldsboro, North Carolina, and is calling Miss Goertz from Goldsboro to Washington and asking her to issue the orders transferring the boys as surplus out of the Air Commando unit and into the Air Transport Command. Her testimony is clear, it is exact, and it is uncontradicted. She fixed November 24th definitely as the date that Radovich called her from Goldsboro and asked her to issue the orders transferring the boys out of the Air Commando group to the Air Transport Command. • • •"

At folio 3216, he added:

> "So that the absurdity of Sam Bayer's claim of extortion is apparent, it is glaring. It is just another of the falsehoods which have characterized his statements continuously since August, 1944."

Thus, it must be clear that the final and basic argument of the United States Attorney was that the defense's version of November 24th was "another falsehood", because Miss Goertz definitely placed Radovich as in Goldsboro on that date. Accordingly, it must also be clear that the Circuit Court of Appeals neither misconstrued nor misstated the summation of the United States Attorney.

(4) On the next morning after this summation and before the charge to the jury, Mr. Keenan (the Bayers' counsel) informed the Court in chambers (3347-52) that, in view of the statements in the U. S. Attorney's summation above referred to, he was checking with the Telephone Company and that the Government must have among the records of the Bayers, which it had subpoenaed, a bill for a collect call from Washington on November 24th. He also stated that he wished to show that Radovich was in New York, as testified to by Miss Solomon, on November 24th and 25th (3352-3).

The prosecution thereupon admitted that it had taken possession of Bayers' records by subpoena, and agreed to look through them for such a bill (3355, 3372-3).

The prosecution, shortly thereafter, produced from its files a *bill* of the Telephone Company to the Bayers, showing a collect call to Bayers' office from Washington on November 24th (3373-4).

Proceedings were then resumed in open court in the presence of the jury (3385). The Court proceeded to tell the jury, at the outset of its charge, that a Telephone Company bill to the Bayers showed a collect call from

Washington to the Bayers on November 24th, but that "the record *does not show from whom the call came*" (3386-7).

It can be seen that what the Court said concerning the bill of the Telephone Company not only failed to connect Radovich with the collect call on November 24th but actually implied the absence of such connection.

(5) The jury retired at 11:45 A. M. and returned for further enlightenment at 3:45 P. M. (3461). At that time, Juror No. 6 asked to hear again the U. S. Attorney's summation concerning "the meetings and messages" on November 24th and 25th (3487-8, 3499). Another juror asked where these facts "can be found in any of the evidence" (3499).

Very evidently the jurors had in mind that part of the U. S. Attorney's summation in which it was argued that Radovich could not have been in New York on November 24th in view of Miss Goertz's testimony that he telephoned to her from Goldsboro, North Carolina, on that date. The Court declined the request to have that portion of the summation read (3488).

Eight minutes later the jury were again in court, requesting references to pertinent parts of the testimony as to that period (3499).

The Court, in response to this request referred the jury to the testimony of Miss Goertz, Miss Solomon and Usdan in reference to the dates, but did not cause any of it to be read. The Court said that the jury must rely on their memories (3500).

The jury thereupon again retired at 4:27 P. M. (3506). After the jury retired, Mr. Cohen, the associate defense counsel for Bayers, stated to the Court that the defense had not known that the U. S. Attorney was to make such an argument about November 24th; that he had made it only at the end of his summation; and that since that time the defense had secured the original record of the Tele-

phone Company's office in the form of an official *sheet*, showing that the call had been made *by Radovich* (3509).

Mr. Cohen asked leave to put this Telephone Company record in evidence, and emphasized that this was "highly important in view of the statements made to the jury by your Honor," especially the statement that the *bill* had not shown from whom the collect call from Washington had come (3509-10). Mr. Cohen also emphasized the significance of the request made by one of the jurors "for further information concerning those dates." He said that the subject had evidently become "of great moment to the jurors" (3509, 3515).

Mr. Cohen then exhibited the record of the Telephone Company in open court (3510). It showed a collect call from Arlington, Virginia, to Bayers' office *by Radovich* ("Captain Ravish") on November 24, 1943 (3509-13). Obviously the call was from the Pentagon or the Washington Airport. In other words, Radovich was in Washington and not in Goldsboro; and obviously Radovich could easily have flown therefrom in an hour or so for a meeting at Cavanaugh's Restaurant later that day.

The Court refused, however, to admit the Telephone Company's record in evidence or to call it to the attention of the jury. The Court said that it came too late (3517-18).

Exception was taken to the ruling of the Court (3519). A motion was also made either for a mistrial or a new trial, which was denied; and exception again taken (3519).

(6) These rulings were serious error and, in view of what had occurred in court and in the minds of the jury concerning the date November 24th, gravely prejudicial. The case was still within the Court's control and was still being considered by the jury.

In view of the importance which the issue of November 24th and 25th had assumed, the jury should not have

been left with a fragmentary and distorted picture of the actual facts. In formulating rules of evidence for federal criminal trials, this Court has never limited itself to strict canons but has been guided "by considerations of justice" (*McNabb* v. *United States*, 318 U. S. 332, 340-1). Far more is involved than a mere matter of discretion, and the cases cited in petitioner's brief (p. 84) are not in point.

If Radovich did call the Bayers from Washington on November 24th and demand an immediate meeting in New York, *it could only have been for extortion.*

He was then in a position to show the Bayers that these two untrained and inexperienced boys were on that very day travelling south from New England under his orders to join his Commando Unit for immediate service in Burma.

For two months previously Radovich had had no communication with the Bayers (3686). He knew the whereabouts of the two boys, because he had inquired of Captain Pepper (624-5). Just before November 24th the special order for the boys' transfer to the Commando Unit had been issued *at the instance of Radovich himself.* To quote the Government's brief (p. 8):

> "On November 22, 1943, at the request of Radovich, a teletype message was sent from Headquarters Army Air Forces in Washington directing the transfer of Melvin and Martin from the Airborne Engineers to the First Air Commando Group at Goldsboro, North Carolina, and ordering them to report not later than November 25 (Govt. Ex. 3, R. 118-121, 1217-1218; R. 256)."

And to quote the Government's brief in the Circuit Court of Appeals (p. 3): This Air Commando Unit was then "scheduled for immediate over-seas duty in the China-Burma-India Theatre."

Thus, on November 24th Radovich had the trap baited and ready for springing. If, on that day, he was not in Goldsboro but at the Pentagon Building or the Washington Airport telephoning a demand to meet the Bayers in New York, his purpose was clearly to extort a promise of money for opening the jaws of the trap.

No wonder the jury attached vast importance to the whereabouts of Radovich on November 24th, and to whether he was telephoning in a demand to see the Bayers on that date.

(7) Obviously, the verdict could well have been different, had the jury been allowed to have knowledge of this final crucial fact, disclosed by the Telephone Company's office record, that Radovich was not in Goldsboro on November 24th as testified by Miss Goertz, but was at the Capitol telephoning the Bayers for an immediate appointment, as testified by Miss Solomon and as stated by Samuel Bayer.

This was the very fact which the Trial Court itself had pointedly told the jury several hours earlier was missing from the Telephone Company's bill to the Bayers. It constituted the missing link in the chain of evidence.

Hence, the Circuit Court of Appeals, guided "by considerations of justice" (*McNabb* v. *United States*, 318 U. S. 332, 340-1), was entirely correct in holding that, because of these rulings by the Trial Court, "the ends of justice" would be best served by a new trial. To quote the Circuit Court's opinion (p. 968):

> "How important the matter had become was unmistakably shown by the jury itself. After four hours of deliberation, it returned to ask further instructions, one juror stating that several of them desired to hear again this part of government counsel's summation. And when recalled by the court eight minutes later, another juror had asked for references to pertinent parts of the testimony. Obviously the jury—however erroneously or for whatever

reason — was vitally concerned with the question. While ordinarily a trial judge has a large area of discretion as to the reopening of a case for additional evidence, we think that in view of the importance which this issue had assumed the jury should not have been left with a partial and a misleading picture of the facts."

The consequences of the conviction in this case were altogether too serious to be at the hazard of merely technical considerations,—particularly as the Trial Judge himself, after the evidence had been closed and after the summations had occurred, had appreciated the vital importance which the District Attorney's summation had caused to be attached to the whereabouts of Radovich on November 24 and to the silent but conclusive evidence which the telephone records would furnish. In consequence, the Trial Judge introduced his charge by informing the jury that there had come before him since the summations a telephone bill which recorded a collect charge to the Bayers from Washington on November 24; but he emasculated its significance by telling the jury that it did not identify the telephoner, an identification which was soon supplied by the official record of the call itself (3386-7).

We respectfully submit that the Trial Judge having himself invited the jury to a partial glimpse of this crucial fact, should have made available to the jury the full truth about it in the interest of justice.

POINT III

The record on the Bayers' motion for a new trial also establishes and emphasizes the injustice of the exclusion of the decisive record of the Telephone Company as to November 24, 1943.

That record demonstrates that there was no call by Radovich from Goldsboro, North Carolina, on November 24; that Radovich actually was in New York on November 24 and 25; and that Miss Solomon and the Bayers were correct as to the events of those days.

(1) After the verdict and sentence, the Bayers moved for a new trial. They again presented the Telephone Company's record of Radovich's collect call to the Bayers from the Capitol area on November 24. They offered it, together with other new evidence related to it and to November 24 and 25, as newly discovered evidence presented pursuant to Criminal Rule 33.

Judge Barksdale, however, adhered to his ruling on the subject at the trial and denied the motion.

The record on that motion was thereupon printed and filed with the Circuit Court of Appeals at the time of the argument of the appeals from the judgment of conviction.

Printed copies thereof were thereafter certified to this Court by the Clerk of the Circuit Court of Appeals, with his certificate that "the attached were used on the argument of the above-entitled case in this Court."

The petitioner's brief treats these papers thus certified as part of the Record before this Court, for at pages 81 to 84 inclusive it refers to them, cites statements at various pages therein, and seeks to support its position thereby. See, particularly, the footnote to page 81 of the petitioner's brief, asserting that a certified copy of these

papers, which it refers to as "this document," "has been filed with the Clerk" of this Court.

The conclusion of the Circuit Court of Appeals for a new trial is strongly confirmed by the affidavits and evidence thus presented on this motion for a new trial.

(2) Miss Solomon's affidavit therein explained that after the United States Attorney's summation she went at once to the office of the Telephone Company and obtained the official record of the long distance telephone call made by Radovich on November 24th from Arlington, presumably either the Pentagon or the Washington Airport (p. 45). A copy is annexed to the motion papers as "Exhibit A" (p. 31). This call was made collect to the Bayers' telephone number in New York City at 11:44 A. M. by Radovich ("Capt. Ravish"). Thus, the official record is proof conclusive that Miss Solomon's testimony was accurate, and that Miss Goertz erred in testifying that Radovich telephoned to her from Goldsboro at that time (pp. 45-6).

The testimony of Miss Goertz in the court-martial proceeding against Radovich is also set forth in the motion papers (pp. 32-39). It contains no reference whatever to the date of November 24th. Her testimony therein concerning the dates is entirely different from her testimony at the trial (766-7). The United States Attorney had made her testimony, which he said was uncontradicted, the climax of his argument that Radovich could not have been in New York on November 24th (3213-15). The jurors' questions indicated that they had Miss Goertz's testimony and the prosecutor's summation on that point in their minds.

Also, attached to those motion papers, is the official flight records of Radovich in his plane from November 22, 1943, to November 26, 1943 (both dates inclusive) (p. 48). They show that on November 24 Radovich was in Washington at 9.30 a.m., in ample time to send the collect telephone call to the Bayers later that morning as testified by

Miss Solomon. They also show that, as testified by Miss Solomon and as asserted in the Bayers' statements, he was again in New York on November 25, 1943, the date when they finally promised to pay him $5,000. These flight records prove conclusively that he could not have been in Goldsboro, North Carolina, at any time on November 24. Accompanying these flight records there is a statement by Radovich himself that it is possible that he "caught a lift" by another plane to New York and back to Washington in the course of November 24; that he remembered last seeing the Bayers in New York on the day "after the luncheon at Cavanaugh's"; that he also remembered being taken by taxicab to LaGuardia Airport; and that he is quite sure he was not in Goldsboro on November 24 (pp. 47-8).

Furthermore, the record on the motion for a new trial demolishes completely the petitioner's argument that because the orders for the transfer of the two boys out of Radovich's Burma unit were initiated in an official letter dated November 25 (363), therefore Radovich could not have been in New York on November 24 and 25 to extort $5,000 from the Bayers as the price for authorizing such transfer. Actually, the date of that letter proves just the opposite, because Radovich did not extort the final promise of the Bayers to pay the $5,000 until November 25. The moment he had their promise, he caused a preliminary letter for the transfer to be issued. He received the money in Goldsboro on November 27 (pp. 21, 43 of motion papers and folios 3838-9 of Record). The official Special Order for the transfer is dated November 29, 1943 (362-3).

(3) The petitioner's brief contains a twice-repeated assertion that the decision of the Circuit Court of Appeals puts "a premium on lawyers' afterthoughts" (pp. 31, 84).

There is no justification or warrant for that statement. Miss Solomon's affidavit shows that she desired to vindi-

cate the truthfulness of her testimony and that, therefore, after the summation of the United States Attorney she went to the office of the Telephone Company and promptly obtained the Company's record of Radovich's long distance call. That record fully vindicated her. The circumstances are all set forth in her affidavit on the motion for a new trial (pp. 44-6).

Surely, this was not a "lawyer's afterthought". It was occasioned by the statements of the United States Attorney at the close of his summation, which was followed by the immediate check of the Telephone Company's records (3508-10).

(4) The petitioner's brief urges, with seeming seriousness, that Radovich's telephone call from Washington on November 24th was not a "matter of importance" (Brief, pp. 31, 81). To the precise opposite, it was a matter of vital importance and relevancy upon the issue of extortion. The jury's questions and remarks indicated that they appreciated this fact and were gravely concerned with it. The identical logic which induced the Trial Court to receive in evidence the Telephone Company *bill*, after reopening the case for that purpose, should have led it to receive the Telephone Company *record* itself. The bill, as the Trial Court said, did not show from whom the Washington collect call came. The slip supplied the "missing link". It furnished the very proof which the Trial Court itself had stated to the jury was lacking (3386-7).

In the light of the questions and remarks of the jurors, this issue went to the crux of the case. The jury was vitally concerned with it. If the jury had had this "missing link" their verdict, the very wording of which shows the extreme doubt in their minds, might well have been different.

POINT IV

The Trial Court committed seriously prejudicial error in not charging the jury that gifts made by the Bayers to officers other than Radovich were not evidence of conspiracy with Radovich, and that there was no evidence of any conspirac o defraud the United State of the honest services of such other officers.

The Court committed further prejudicial error in charging, in effect, the very opposite.

(1) The only conspiracy charged in the indictment was between the Bayers, Radovich and "divers persons" whose names were unknown (23).

The case was tried by the prosecution on the theory that the charge at issue was a conspiracy by the Bayers to defraud the United States of the service of Radovich,—not of any other officer.

The prosecution had called as witnesses a number of Army officers who testified to gifts or entertainment by the Bayers, but all of whom categorically denied (without contradiction) that no effort had been made to influence them to take improper action as regards the two boys or otherwise (429, 432-4, 540, 544-5, 867, 1136, 1149).

Hence, at the close of the trial, it was vitally important that the jury should be instructed that the indictment's charge of a conspiracy to seduce officers other than Radovich had failed of proof; that there was no evidence that the Bayers either with or without Radovich had conspired to corrupt the other officers; that no improper action by other officers as regards the two boys had been shown; and that the gifts to or entertainment of other officers were not proof of the substantive issue ultimately submitted to the jury.

(2) The presence, however, of this mass of testimony, which had no legitimate bearing upon the basic factual and legal issue ultimately submitted to the jury, could readily be misunderstood and misapplied by the jury. It was dangerously prejudicial to the Bayers.

Even the petitioner's brief herein concedes (p. 91) that the Trial Court never expressly stated to the jury "that evidence of the dealings with other officers was limited to motive and intent." (assuming that it was relevant at the end of the trial even for that limited purpose).

On the contrary, the Trial Judge gave a charge which could be well (if not necessarily) understood by the jury as authorizing them to consider this evidence not only on the substantive issue but also as proving (what was not even alleged in the indictment) that these other officers who had testified as witnesses "were guilty of participation in the conspiracy here alleged". That charge read as follows (3411):

> "Whether these persons, or any of them, or any of the persons who have testified as witnesses, were guilty of participation in the conspiracy here alleged, is of no concern to you except insofar as their activities have a bearing on the guilt or innocence of the defendants of the offense charged, and as such participation may bear on the weight or credibility of their evidence."

We emphasize again that the indictment did not charge that anyone "participated" in the alleged conspiracy other than the Bayers and Radovich except that it also included "divers other persons whose names are to the Grand Jury unknown" (23). Other "officers of the United States Army" were referred to in the indictment; but only as the objects of the alleged conspiracy and not at all as participants in it. Not only is it not alleged that the names of such other officers were unknown, but they are actually identified by the posts with which they were connected; and, presumably, they had testified before the Grand Jury (24, 25).

Hence, the foregoing charge to the jury was, we submit, grossly prejudicial error because it authorized the jury to find, on the part of such other officers who had testified, a "participation in the conspiracy here alleged" notwithstanding that there was no such "participation" charged in the indictment, and notwithstanding that every such officer had denied such participation, and notwithstanding that there was no evidence of any such participation. This charge could not possibly have included the Bayers or Radovich among the "witnesses" referred to, because they had not testified.

(3) This charge was, we also submit, grossly erroneous because it told the jury that if they found "participation in the conspiracy here alleged" by "any of the persons who testified as witnesses," such participation would "have a bearing on the guilt or innocence of the defendants of the offense charged."

In other words, the Trial Judge in effect told the jury that they could find that any or all of the half dozen Army officers who testified for the prosecution and who in one form or another had been entertained or given gifts by either of the Bayers "were guilty of participation in the conspiracy here alleged," and that such a finding would "have a bearing on the guilt or innocence of the defendants of the offense charged."

(4) Furthermore, counsel for the Bayers unsuccessfully asked the Trial Judge in various forms to charge the jury that there was no evidence that they had engaged in unlawful conduct with other officers, and that evidence of gratuities to other officers "would not in itself constitute any evidence of guilt on the part of" either of the Bayers (3299-3311, Requests 48 and 56).

(5) Nor were these prejudicial errors in the main charge cured in any way by the Judge's subsequent re-

sponse to the following question by a juror on the occasion of one of the jury's several returns in search of further clarity (3502):

> "Another juror: I don't know whether this is apropos, but in the minds of some of the jurors there appears to be a little confusion regarding the guilt of others in connection with the three that are now on trial, and it seems to me perhaps it might be clarified by the Judge, perhaps, to clear their minds of the idea that—I mean, we seem to be a little confused."

To this the Judge replied (3504):

> "The only persons whom you are trying in this case are the three defendants, Elias Bayer, Samuel Bayer and the defendant Radovich, and the only persons as to whom your verdict can in any wise affect, and they are the only persons whose guilt or innocence you should consider. Now there are other persons who have been mentioned in the testimony, persons who have testified here about their own activity in connection with the activities of these defendants. Now as to whether those persons, or any of them, are guilty or innocent of anything, should not concern you at all, they are not here on trial, with this exception: you may consider that for what bearing their activities have upon the actions of the defendants who are upon trial and for what effect in your judgment the activities of these other persons might have upon the testimony which they have given, that is whether it is true or not, whether it is all true or part true. But as to whether they are guilty, whether any person other than those named in this indictment are guilty of any offense or not, is not a matter which should concern you at all. You are charged with the duty of trying the persons named in the indictment and those only."

This subsequent instruction, we respectfully submit, merely repeated and emphasized the preceding errors, and certainly surrounded with confusion and obscurity what should have been made clear and definite.

Here again there was no statement that the actions of the Bayers as to other officers could be considered, if at all, only on motive and intent. On the contrary, the jury was told that they could pass on an issue not even presented by the indictment, to wit, as to whether any of the other testifying officers were "guilty or innocent of anything," and, indeed, that they should "consider *that*," to wit, the guilt or innocence of such officers, "for what bearing their activities may have upon the actions of the defendants who are upon trial," and also for what bearing it might have upon the credibility of the "testimony which they have given" (3505).

To this supplemental charge the Bayers excepted (3506-7).

(6) Thus, on these vital issues, precisely as on those discussed in Point I hereof, the charge was, we submit, erroneous, equivocal, and altogether capable of confusing and misleading a jury of laymen.

POINT V

The Trial Court also permitted and committed prejudicial error as regards the so-called "alias" and the alternative name "Boyarsky", repeatedly assigned to the Bayers throughout the indictment.

As a prelude to the new trial, these invidious repetitions should be stricken out.

The indictment names these defendants as (23):

> "Samuel Bayer, alias Samuel Boyarsky,
> Elias Bayer, alias Elias Boyarsky"

The same "alias" is repeated in the indictment thereafter nearly every time the defendants Bayer are mentioned,—even in the overt acts,—a total of *twelve repetitions.*

Each repetition of "alias" is coupled with the word "Boyarsky", strongly suggestive of a racial and foreign origin not at all connoted by the name "Bayer".

This extraordinary and wholly unnecessary drumming in the indictment on "alias" and on "Boyarsky" was indefensible; and, in view of the time and the nature of the accusation, was prone to excite prejudice, animus and even intolerance. It was highly dangerous and unfair to the Bayers.

There was not the slightest justification for such poisoning of the stream of justice at its source. The Bayers had no criminal record. They were not using two names. There was no question as to their identity. Their name was "Bayer". By that name alone they were known throughout all the events involved and by all the witnesses who testified. There was no evidence whatever of any alias or of the invidious implications which that word conveys to the common mind.

At the close of the charge a request was made that the jury be instructed to disregard these prejudicial words in the indictment (3440). The request was made *after* the jury had received the main charge and had retired (3423), for the Court had directed that counsel state their objections after the jury had left the courtroom (3423). Accordingly the jury was called back; and the following transpired (3455):

> "The Court: Ladies and gentlemen, I have only one matter to add: It has been called to my attention that the indictment as to the two defendants Bayer, refers to them as Samuel and Elias Bayer, alias Samuel Boyarsky and Elias Boyarsky. I charge you that there is no inference to be drawn by you from that statement in the indictment. The literal meaning of the word 'alias' is 'other or otherwise', and carries no inference. However, in common acceptation of the word it sometimes is considered to refer to a person who has more than one name for improper purposes. There is no proof about that, and I

charge you to not infer anything of an evil nature from the fact. I do not think on the other hand that you should infer any improper conduct on the part of the Government by so naming them in the indictment, because it appears somewhere from their statements, I think, that the name Boyarsky was their Russian name before they became Americanized. So I direct you to disregard the alias reference entirely. • • •

"Mr. Keenan: I take exception, your Honor, to the manner in which you charged on the alias.

"The Court: Yes, sir.

"Mr. Keenan: As being in itself inflammatory.

"The Court: You may note an exception.

"All right. If during your deliberations you should desire any further elucidation on the matter of the law and its application to the facts, I will endeavor to give it to you upon request.

"In view of the exception just made by counsel, I wish to state that I certainly meant nothing inflammatory or derogatory to any one person whatsoever, and I charge you that I certainly meant none and I don't believe you received any. All right."

The petitioner's brief now says (pp. 91, 92) that had not the Bayers' counsel thus brought up the matter of "alias" and "Boyarsky", the jury would never have learned of the presence of those words in the indictment.

The indictment was part of the record of the trial. The "alias" and the "Boyarsky" are carried into the docket (7) and are in the title with which the testimony begins (67). There is no justification for saying that the jury had not become aware of these invidious terms in the indictment. Obviously, the consciousness of that awareness was what prompted the Bayers' counsel to request the instruction above mentioned. The Trial Court itself treated the matter as one before the jury. It did not say to counsel that the references in the indictment had not come to the notice of the jury and could not come to their notice.

Nor was there anything in the statements of the Bayers to justify the Court's charge "that the name Boyarsky was their Russian name before they became Americanized".

CONCLUSION

The decree for a new trial in the interest of "the ends of justice" should be affirmed; and the references in the indictment to "alias" and "Boyarsky" should be stricken out.

Respectfully submitted,

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